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In the Supreme Court of the United States

OCTOBER TERM, 1997

THE DELAWARE RIVER AND BAY AUTHORITY,
Petitioner,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 68, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF AMICUS CURIAE OF THE STATE OF DELAWARE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The State of Delaware is one of the parties to the Delaware–New Jersey Compact ("Compact") establishing the Delaware River and Bay Authority ("DRBA" or "Authority"). As such, Delaware is vitally interested in the manner in which the Compact is enforced. In this case, the New Jersey Supreme Court — in direct conflict with decisions of other state high courts — imposed on the Authority the duty to bargain collectively with its employees, even though the Compact expressly reserves to the Authority (and only the Authority) the power "to fix and determine * * * all * * * conditions and terms of employment." Compact art. VII(e). The Court imposed that far-reaching obligation because, in its view, "complementary or parallel legislation" of both states generally recognizes the right of public sector employees to bargain collectively with their employers. Although the relevant legislation of each state is not identical, and did not purport to alter the terms of the Compact, the New Jersey high court concluded (Pet. App. 12a) that "[i]n effect, the legislatures have modified the Compact."

If allowed to stand, the New Jersey high court's decision would vest in the state courts of *one* contracting state the power to rewrite the Compact, thereby violating the basic principle that "bi-state entities created by compact * * * are not subject to the unilateral control of any one of the States that compose the federal system" (*Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994)). Although the court below did not and could not find that Delaware actually consented to the imposition of collective bargaining rights on the Authority, the court felt free to infer such consent from some general legislation concerning public employee bargaining rights. In fact, the State of Delaware has never agreed that collective bargaining duties should be imposed on the DRBA, and the decision below thus represents a direct infringement of the principles of state sovereignty that underlie both the Compact itself and, more generally, the Compact Clause of the United States Constitution (art. I, § 10, cl. 3). The decision below also works an implied repeal of

the Compact, in that it imposes collective bargaining obligations on the Authority in express contravention of the text of the bistate agreement. Delaware therefore submits this brief in support of the Authority's petition for a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Article VII(e) of the Compact unambiguously reserves to the Authority the power "to fix and determine * * * all * * * conditions and terms of employment." Pet. App. 59a. The court below surmised (*id.* at 12a), however, that Delaware and New Jersey have "[i]n effect * * * modified the Compact" by enacting "complementary and parallel" labor statutes. Although the statutes concededly are "not identical," and do not purport to cover bistate agencies at all (much less the DRBA in particular), the New Jersey high court concluded that Article VII(e) has effectively been abrogated.

As petitioner persuasively demonstrates (Pet. 12-20), the decision of the New Jersey high court cannot be squared with this Court's Compact Clause cases and flatly conflicts with decisions of other state high courts. Moreover, if uncorrected, the decision will, as petitioner also shows (Pet. 21-29), significantly disrupt the operation of the DRBA and other interstate agencies. Beyond those important reasons for granting review, the decision below also impairs the sovereignty of the State of Delaware and effects an implied repeal of federal legislation, in contravention of this Court's precedents. For those two reasons as well, as we set out below, the petition for a writ of certiorari should be granted.

A. This Court's Compact Clause cases recognize that contracting states surrender a portion of their sovereignty when they enter into bistate agreements. In return, however, states are entitled to insist that the terms of the compact be strictly enforced. Consistent with that basic premise, this Court has applied the plain meaning of compact provisions, even when a modification of the text may have served some

practical purpose. Were courts free to depart from the text of the compact, states might relinquish a part of their sovereignty only to discover — as Delaware has discovered in this case — that the bargain they thought they had struck has been altered without their consent.

The New Jersey Supreme Court's decision in this case violates this basic principle of state sovereignty. In place of the unambiguous text of the Compact, the court below substituted a highly debatable inference that it derived, not from the Compact itself, but from "complementary and parallel" legislation in the contracting states. It did so notwithstanding the fact that the legislation in question does not purport to cover the DRBA, much less modify the Compact. In the process, the court effectively circumvented the procedures prescribed by the Compact for imposing new obligations on the Authority — procedures that are designed to promote, not undermine, principles of state sovereignty. As a consequence the State of Delaware — which has never consented to the imposition of collective bargaining obligations on the Authority — has been deprived of its right, as a separate sovereign, to exercise its own views as to how the affairs of a bistate entity should be conducted.

B. "[A] congressionally approved compact is both a contract and a statute." *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991). As federal *statutes*, compacts are subject to the well-settled principle that "repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986). Only where the "intent to repeal is 'clear and manifest'" (*Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987)), may a court infer that a compact (or any other federal statute) has been impliedly repealed by some later legislation.

In substance, the court below held that New Jersey and Delaware labor laws have impliedly repealed the crucial portion of the Compact reserving to the Authority the power "to fix and determine * * * all * * * conditions and terms of

employment" (art. VII(e)). But there is no evidence, much less "clear and manifest" evidence, that the state legislation in question was intended to "modify" (Pet. App. 12a) the Compact. In this respect as well, the decision below cannot be squared with this Court's precedents. The petition for a writ of certiorari should be granted.

ARGUMENT

I. THE NEW JERSEY SUPREME COURT'S DECISION UNDERMINES THE PRINCIPLES OF STATE SOVEREIGNTY UNDERLYING THE COMPACT CLAUSE AND EMBODIED IN THE COMPACT AT ISSUE IN THIS CASE

1. "The States, as separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three distinct sovereigns: two States and the Federal government." *Hess*, 513 U.S. at 40. As this Court pointed out in *Hess*, "'[a]n interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" *Id.* at 42 (quoting M. Ridgeway, *Interstate Compacts: A Question of Federalism* 300 (1971)). In essence, "[a] state, in entering into a compact, surrenders a portion of its own sovereignty to the other compact states and the federal government, and agrees to be bound by the compact terms and conditions, absent the concerted action of the compact states to alter them with the consent of Congress." Pet. 13.

In return for this partial surrender of sovereignty, however, states are entitled to insist that the terms of the compact be strictly enforced. "Because each state relinquishes a portion of its sovereignty to enter into an interstate compact, the resulting bi-state agency is established *with precisely limited powers* over which the states may only exercise joint control." Pet. App. 25a (emphasis added). Once established, these "precisely limited powers" should not be subject to modification without the consent of each of the contracting

states. To paraphrase this Court's decision in *Pennhurst State Sch. and Hosp.* v. *Halderman*, 451 U.S. 1, 17, 25 (1981) — involving legislation enacted under Congress's spending power — "[t]he legitimacy" of a State's surrender of partial sovereignty "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract,'" and it is inconsistent with that premise to construe such agreements in a manner that "surpris[es] participating States with postacceptance or 'retroactive' conditions."

This principle has particular force because interstate compacts routinely govern areas of public life in which the authority of individual states would otherwise be plenary. See Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 St. John's L. Rev. 1, 2 (1985) (among the approximately 176 operative compacts are those governing "flood control, corrections, and mass transit"). States yield their authority in these and other areas only on the premise that the terms of their agreements will be scrupulously honored. They don't expect surprises.

Indeed, consistent with this basic sovereignty principle, this Court has strictly enforced compact terms — even where altering the compact may have made practical sense. *Texas* v. *New Mexico*, 462 U.S. 554 (1983), which construed the Pecos River Compact, illustrates the point. The Compact sought to resolve certain disputes between Texas and New Mexico regarding the allocation of waters of the Pecos River. Toward that end, the Compact established a Commission consisting of one voting member from each state and a nonvoting representative of the United States. Unfortunately, however, the two voting members could not agree on a particular matter, and the Special Master, sensing a stalemate in the making, sensibly recommended that the United States representative, or some third party, be empowered to break the tie.

This Court sustained an exception to the Special Master's recommendation. True, the Court observed (462 U.S. at 565), "the structural likelihood of impasse on the Pecos River Commission is a serious matter," and the parties "might well consider amending their Compact to provide for some mutually acceptable method for resolving paralyzing impasses such as the one that gave rise to this suit." Nevertheless, the Court added (*id.* at 564-565), "[t]o provide a third, tie-breaking vote on regular Commission business would be to alter fundamentally the structure of the Commission." That result, the Court held, however practical it may be, was simply impermissible: "[N]o court may order relief inconsistent with [the] express terms" of the Compact. *Id.* at 564-565.

This Court's cases also recognize that, *if* the terms of a compact are to be altered, such an alteration may not be effected through the actions of only *one* of the contracting states. "[B]istate entities created by compact * * * are not subject to the unilateral control of any one of the States that compose the federal system." *Hess*, 513 U.S. at 42. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *Dyer* v. *Sims*, 341 U.S. 22, 28 (1951). After all, "[a] State cannot be its own ultimate judge in a controversy with a sister State." *Ibid.*

2. The Compact at issue in this case embodies these important sovereignty principles, ensuring that each contracting state's interests will be fully accounted for in any action taken by the Authority. Pursuant to the terms of the Compact, the DRBA is governed by a twelve-member board of commissioners, consisting of six residents of each state, appointed by the governor of their respective states. Compact art. V. Moreover, any action taken by the Board must be approved by at least four commissioners from each state. *Id.* art. VI. And even then, the governor of either state may

cancel the vote of one or more of that state's commissioners, effectively giving each state the ability to veto the Authority's actions. *Ibid.*

These careful, structural protections of each state's sovereignty reflect the same premise that animates this Court's Compact Clause cases. Although "the creation of an interstate agency requires each State to relinquish to one or more sister States a part of its sovereignty" (*Port Auth. Trans-Hudson Corp.* v. *Feeney*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring in part and concurring in the judgment)), that surrender of sovereignty is only partial. In return for their cession of some measure of sovereignty, the contracting states are entitled to a strict enforcement of their compact and an assurance that neither state can unilaterally alter the terms of the deal.

3. The decision below violates these fundamental sovereignty principles. The New Jersey high court explained (Pet. App. 10a) that New Jersey and Delaware have "substantially similar" legislation regarding the bargaining rights of public employees. True, the court noted, the two states' laws are "not identical" (*id.* at 12a). Nor do the laws in question actually purport to amend the Compact, and the court did not suggest otherwise. Nonetheless, the court held (*ibid.*), because "the legislatures of both states have concluded that public employees should have the right of collective negotiation and that employers should not interfere with that right," it follows that "[i]n effect, the legislatures have modified the Compact."

The New Jersey high court may or may not be correct as a matter of social policy, but it is surely mistaken as a matter of Compact law. As this Court made clear in *Texas* v. *New Mexico*, 462 U.S. 554, courts are not free to rewrite the terms of a Compact. Yet that is exactly what the court below has done. Drawing inferences from some general legislation in the two contracting states, the court vitiated the plain language

of Article VII(e), which unambiguously reserves to the Authority, in its exclusive discretion, the power "to fix and determine * * * all * * * conditions and terms of employment."

The court simply had no warrant for acting as it did. Merely because the two states may have separately enacted "complementary" or "parallel" legislation regarding public employee bargaining cannot, standing alone, give rise to an inference that the two states intended to modify the Compact. Indeed, such an inference is unusually ill-founded in this case, as the laws in question are "similar" (Pet. App. 10a) only when considered at a high level of generality; the devil, as always, is in the details. As Justice Garibaldi explained in dissent (Pet. App. 20a-21a), the two states' laws differ in a variety of important respects. See also 19 *Del. C.* § 1302(m) (excluding various categories of employees from the scope of public employee bargaining rights).

In short, it makes no sense to infer an intent to modify the Compact from legislation that does not purport to do so. In fact, as petitioner explains (Pet. 5, 16), when New Jersey and Delaware *intended* to modify the Compact — to subject the DRBA to their parallel environmental laws — they did so by enacting nearly identical legislation and stated in express terms that the legislation was intended to cover the Authority and amend the Compact. See Pet. 16 n.13. Plainly, the two states knew how to modify the Compact when they wanted to do so. By contrast, the State of Delaware did not seek to make the modification at issue in this case and has not consented to it. Under the reasoning of the New Jersey Supreme Court, however, Delaware's intent is of no moment, so long as a single state court — reasoning from very general, "complementary and parallel" legislation — infers an intent to alter the bistate agreement.

The New Jersey high court's basic alteration of the Compact constitutes a direct affront to Delaware's sovereignty.

Had the commissioners themselves adopted this change in the agreement, their decision to do so would have been subject to the Governor's veto. By judicial fiat, however, the New Jersey high court deprived the Governor, and thus the State, of their basic prerogatives. The petition should be granted so that Delaware's rights are not held hostage to "the unilateral control" (*Hess*, 513 U.S. at 42) of a New Jersey state court.

II. THE NEW JERSEY SUPREME COURT'S DECISION WORKS AN IMPLIED REPEAL OF A PROVISION OF THE COMPACT, AND THUS OF FEDERAL LAW, IN VIOLATION OF THIS COURT'S CASES

1. "[O]nce given, congressional consent transforms an interstate compact * * * into a law of the United States." *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983). Indeed, as this Court explained in *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991), "a congressionally approved compact is both a contract and a statute." As such, bistate compacts are therefore subject to the principles in this Court's cases governing the construction of federal statutes.

Among those is the "cardinal principle * * * that repeals by implication are not favored." *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986). Accord, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 154 (1976). Only where there is an "irreconcilable conflict" between an earlier and later statute (*Randall*, 478 U.S. at 661), and the "intent to repeal is 'clear and manifest'" (*Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987)), may a court infer that the latter statute works an implied repeal of the former. And that is true even where the latter statute is said to effect only a "partial," not a wholesale, repeal of the former. *Randall*, 478 U.S. at 661.

2. In effect, the court below held that New Jersey and Delaware repealed a key portion of the Compact by enacting "substantially similar" statutes governing public employee

bargaining. By its terms, the Compact reserves only to the Authority the power to "fix and determine" the terms and conditions of employment. Compact art. VII(e). According to the New Jersey Supreme Court, however, the contracting states "modified the Compact" (Pet. App. 12a) by enacting general labor law provisions governing public employees. The court so held despite the fact that neither state's legislation even alluded to the Compact or to the Authority.

That ruling cannot be squared with this Court's cases. There is no conflict at all, much less an "irreconcilable conflict," between the Compact and the two states' labor laws. Nor is there any language, much less "clear and manifest" language, which suggests that the labor provisions were intended to repeal a crucial provision of the Compact. Because the state labor laws make no mention of the Compact, and do not purport to apply to bistate agencies, they should not be applied to the Authority. Put another way, since the statutes are "capable of co-existence," it was "the duty of the courts * * * to regard each as effective." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (quotation marks and citation omitted).

That is especially true in light of the generality of the state labor provisions on which the court below relied. In contrast to Article VII(e) of the Compact — which deals narrowly and specifically with the labor law duties of the DRBA — the Delaware and New Jersey statutes invoked by the New Jersey high court purport to deal with public employees generally, making no mention of bistate agencies like the Authority in particular. Yet "[i]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum, * * * unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." *Traynor* v. *Turnage*, 485 U.S. 535, 547-548

(1988) (internal quotation marks deleted; bracketed text in the original). "As always, '[w]here there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (emphasis in the original). Surely there was no "clear" intention to cover the Authority in the two states' public employee statutes. To the contrary, the state statutes dealt generically with public employees, but did not address the Compact in any way.

In the New Jersey Supreme Court's view, however, the absence of any such explicit intent to modify the Compact was beside the point. For the court below, it sufficed that the state labor laws were "substantially similar" (Pet. App. 10a) and generally provided "that public employees should have the right of collective negotiation and that employers should not interfere with that right" (*id.* at 12a). Without any more explicit evidence than that, the court below surmised that Delaware and New Jersey had elected to "modif[y] the Compact." *Ibid.*

That ruling is plainly mistaken. As Justice Garibaldi correctly observed in dissent below, "such legislation cannot and should not be used to repeal the Compact." Pet. App. 14a. For that reason as well, the petition should be granted and the judgment of the New Jersey Supreme Court reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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